ROBERT A. WEIN and ELLEN HARRIS, Individually and as Co-Administrators of the Estate of CHRISTIAN A. WEIN, Deceased DAWN MARIE WEIN COUNTS and ERIC ALLEN WEIN,	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
Plaintiffs	:	
vs.	:	NO. 96-01,744
THE WILLIAMSPORT HOSPITAL AND MEDICAL CENTER; MICHAEL J. DIXON, M.D.	:	CIVIL ACTION - LAW
	:	*IN CAMERA*/PRODUCTION OF DOCUMENTS
Defendants	:	MOTION OF PLAINTIFFS

OPINION AND ORDER

AND NOW, this 24th day of May, 1999, this Opinion and Order are entered in determination of the Motion of Plaintiffs filed January 26, 1999, requesting an *in camera* review of the response of Defendant, The Williamsport Hospital and Medical Center, to Plaintiffs' Request for Production of Documents.

I. Background.

Briefly stated, the facts involved in this medical malpractice action are based upon the allegation that Christian A. Wein, then age 29 and assertedly "developmentally challenged" while a patient at the Williamsport Hospital and Medical Center (hereinafter "Hospital") died on October 29, 1996, after a tonsillectomy and removal of adenoids procedure had been performed by Defendant Dr.

Michael J. Dixon (hereinafter "Dr. Dixon") at the Hospital October 25, 1996.[1]

Plaintiffs filed a pre-complaint discovery request for production of documents, served by the Plaintiffs on the Defendant on or about November 5, 1997, which request stated:

> Please provide you (sic) entire [personnel file] on Dr. Michael J. Dixon to include but not limited to, all records pertaining to his employment with the Hospital, work history records and job performance and evaluation records.

The Hospital initially responded with an objection that the documents were protected under the Peer Review Protection Act, 63 P.S. §425.1, *et seq*. (hereafter "Act").[2;] the Hospital also raised objections as to relevancy. Plaintiffs subsequently filed a Motion to Compel Compliance With the Discovery Request, which motion was finally determined by this Court in an *en banc* Opinion and Order dated November 18, 1998. That Order directed the Hospital to respond to the production request pursuant to Pa.R.C.P. 4009.12(b)(2), identifying the documentation that was not being produced in response to the discovery request with "reasonable particularity." The *en banc* court indicated the following: ". . .[W]e welcome it (4009.12(b)(2)) as a wise solution to a dilemma that many trial court judges have struggled with all too often." The *en banc* court regarded Rule 4009.12(b)(2) as a wise solution to a dilemma with which many trial court judges often struggle- how to determine whether a document falls within a privilege when a party makes a blanket objection asserting that a privilege applies. The new rule puts an end to these vague,

[1] The Court accepts and adopts herein by reference the procedural history and statement of facts set forth in the briefs of the respective parties filed in regard to this motion, specifically, Plaintiffs' brief filed February 12, 1999 and Defendant Williamsport Hospital's brief filed February 8, 1999. In addition to the benefit of these briefs the Court also has received and reviewed Plaintiffs' reply brief filed March 4, 1999. Argument was held March 5, 1999. Although presented without a law clerk the Court has been ably assisted by the research of Mary Ann Johnson, a paralegal student at the Pennsylvania College of Technology. Additional argument as to the applicability of ***Young v. Western Pennsylvania Hospital***, 722 A.2d 153 (Pa. Super. 1998) was received on May 14, 1999.

general objections by requiring the withholding party to produce a meaningful response to allow the discovering party and the court to evaluate whether the documents are discoverable. (Slip Opinion, p. 6).

The *en banc* court rejected the Defendant's contention that Rule 4009.12(b)(2) violated the spirit of the Peer Review Act. The *en banc* holding also accepted the direction of the Superior Court, ***Atkins v. Pottstown Medical Center***, 634 A.2d 258 (Pa. Super. 1993), which recognized that information, documents and records available from other sources are not immune from discovery merely because they were presented to a Peer Review Committee. Such exception is particularly recognized by the Peer Review Protection Act in §524.4.

In discussing the requirement that the objection must identify withheld documents with "reasonable particularity" the *en banc* court recognized that the Supreme Court had drafted the rule wisely, allowing it to be extremely flexible so as to permit a court to determine on an individual basis which disclosures are reasonable and which are not. That determination as stated by the *en banc* court will . . . .

> . . . .[O]f course will depend upon what privilege is being asserted. Certainly in the instant case the hospital would not be required to disclose the identity of Peer Review participants or summarize the contents of the Peer Review proceedings. The rule merely requires the hospital to identify the withheld material with sufficient particularity to enable the court to determine whether the hospital's objection is warranted or not.

The *en banc* court noted this could and should be done in such manner to protect the anonymity of the peer review participants and the confidentiality of the proceedings.

II. <u>The Present Discovery Dispute</u>.

---

[2] The Peer Review Protection Act, Act of 1994, July 20, P.L. 504, No. 193 §1, 63 P.S. § 425.1 *et seq*.

After entry of the *en banc* order, the Hospital provided a second response to Plaintiffs' Request for Production of Documents, dated December 18, 1998, which is attached as Exhibit "1" to Plaintiffs' Motion. This second response identifies 113 documents and raises objections to every one, based upon either relevancy and/or the Peer Review Act protections. The typical response designates each document with a number, states the type of objection (relevancy and/or Peer Review), a date (presumably of the document), the number of pages, a brief description (*e.g.*, "photo," "license," "letter," "certificate," "pre-printed form"), the type (typed or handwritten) and the subject. The subject classification generally contains many different types of identification, but where the Peer Review protection objection is raised, the subject is (for the most part) simply stated as being "regarding applications," "regarding privileges," "regarding patient care," or "regarding qualifications." Some other subjects are identified as "medical license," "information to complete application," "authorization and release," "checklists," "application fee" and "verification of DEA numbers."

Plaintiffs' motion contends the typical identification provided by the Hospital's response, rather than being made with reasonable particularity, is so ambiguous as to be worthless in determining the validity of the objection, particularly as to peer review protection. Plaintiffs further argue that, to make a meaningful response with reasonable particularity, the objection based on the Peer Review Protection Act must provide some indication whether the documents were presented to a peer review committee and/or whether they were originally generated for some other original purpose or available from some other original source. Plaintiffs also suggest it would be helpful for the Court to be made aware of the title, the author and

the purpose for which each document was originally created and/or to whom it was originally addressed. Plaintiffs, as a remedy, ask this Court to undertake an *in camera* review of 80 of the 113 documents to determine the validity of the Peer Review Protection Act objection and of another 19 documents to determine whether the relevancy objections are proper.

The Defendant Hospital objects to Plaintiff's request for an *in camera* review of the documents contained in Dr. Dixon's personnel file which it objects to disclosing, asserting it has now met the requirements of the Court's *en banc* decision by identifying the documents not being disclosed with reasonable particularity in compliance with Rule 4009.12. In support of this argument, the Hospital argues the Court's *en banc* opinion does not require it to identify the title of various documents, the names of the individuals who prepared the documents nor to summarize the contents of the documents. Hospital further contends that it is not required under the *en banc* opinion or under the Peer Review Protection Act statute to disclose the identity of peer review participants, nor summarize the contents of peer review proceedings. In addition, the Hospital asserts Rule 4009.12 in and of itself does not provide for an *in camera* review of privileged documents.

III. Compliance With Pa. R.C.P. 4009.12.

The Court is dismayed by the response the Hospital has made. While the *en banc* opinion did not state the specific detail by which the Hospital was to reasonably identify the documents withheld under the Act's protection the *en banc* directive clearly ". . .requires the Hospital to identify the withheld material with sufficient particularity to enable a court to determine whether the Hospital's objection is

warranted or not." Slip Opinion, p. 10. The Hospital's identification in their second response does not identify any document to which the peer review objection raised in such a way as would enable this Court to do anything more than speculate as to whether any objection based on peer review protection is valid.

For instance, Hospital supports its contention of compliance with Rule 4009.12 by reference to Document No. 3. Document No. 3 was identified as an Oregon medical license and was objected to on the grounds of relevancy. The Court agrees Document No. 3 is specifically reasonably identified as to allow the Court or the Plaintiffs to determine it is obviously not a document originally created for a peer review proceeding. However, the Hospital does not attempt to argue why its peer review objections provide an identification by which this Court can reasonably determine the objection's validity. The Hospital's peer review objections made to other documents provide only a date and a vague statement that a particular document is "regarding applications," or "regarding privileges." Such responses do not allow this Court to identify either the purpose for which the document was originally created, or the process by which the document was created.

For this Court to hold that such identification enabled the Court to say the objection was warranted, the court would have to assume that every document existing in the personnel file of Dr. Dixon was created specifically for a Peer Review Committee procedure and was not immune from the Act's protection under §524.4. This Court will not so assume. The particularlity required in identifying the documents where such objections are raised must be such that the Court is able to make a reasonable determination whether the objections are valid. The Hospital must do so by supplying the identification with

the reasonable particularity needed to allow the Court and opposing counsel the opportunity to evaluate the bases and/or legitimacy of the objection. In passing upon the protection afforded by the Act, this Court will require Defendants to supply and identify the purpose for which the documents were prepared and the process by which the documents were created. ***Carr v. Howard,*** *supra;* ***Corrigan v. Methodist Hospital***, 885 F.Supp. 127 (E.D. Pa.1995); s*ee also,* ***Cooper v. Delaware Valley Medical Center***, 630 A.2d 1 (Pa. Super, 1993), *aff'd.* 539 Pa. 620, 654 A.2d 547 (1995). The responses could no doubt also indicate the type of person or entity creating a document or which was its intended original recipient in such manner as to protect the anonymity of those involved but at the same time make it reasonably clear the document is or is not protected by the Act. Such objections should also be supported by an appropriate affidavit by an officer of the corporation concerning the accuracy and truthfulness of the objections.

IV. *In Camera* Review.

The Hospital makes a compelling argument (also argued before the *en banc* court) that establishing a precedent for *in camera* review through the instant case may cause an overwhelming burden upon the Court in the future, where multiple defendants and many documents might be involved. In an appropriate case, however, the procedure will be implemented.

The *en banc* opinion, relying upon ***Commonwealth v. Stewart***, 547 Pa. 277, 690 A.2d 195 (1997), found an *in camera* review may be necessary to resolve a legitimate dispute whether a particular document was discoverable, even though such proceeding is not included in Rule 4009.12(b)(2) (Slip Opinion pp. 8-9); *see also* Pennsylvania Law Weekly volume XXII, Number 13, March 29, 1999, p.

24, *citing* ***Reeder v. Pike*** (C.P. Blair Dec. 24, 1997) PICS Case No. 98-0052; ***Young v. Western Hospital***, discussed *infra*. We felt this was particularly true inasmuch as neither the Peer Review Protection Act nor Rule 4009.12 preclude an *in camera* review. The procedure protects the proceedings and records of the peer review committee from discovery or introduction into evidence, but at the same time allows litigants to obtain access to documents not entitled to such protection. Here, due to the Hospital's inadequate responses, the Court is still unable to ascertain whether a legitimate dispute exists. However, if after the filing of an appropriate response by the Hospital, it appears there is a legitimate dispute which cannot be resolved by the Court after argument, this Court would not hesitate to conduct an *in camera* review.

With respect to discovery proceedings, this Court believes the governing principle which should apply is that an *in camera* review is to be utilized not as a beginning point, but only as a last resort. *See* ***Carr v. Howard***, 426 Mass. 514, 689 N.E.2d 1304 (1998). Here, the Hospital clearly has the ability to reduce the burden which would be placed upon this Court by requiring it to review 119 documents of unknown length and complexity by making it very clear to the parties and the Court why each withheld document is protected by the Peer Review Protection Act.

Accordingly, the discovery response of the Hospital clearly must be amended before this Court would even consider an *in camera* review of the withheld documents. The Court will also defer any ruling on relevancy until after an amended response has been filed.

V. The Appropriateness of Plaintiff's Original Interrogatory.

Unfortunately, the foregoing analysis does not conclude the current inquiry as to whether Plaintiffs are entitled to further response to the November 5, 1997, request for production of documents. Subsequent to the Court's *en banc* decision of November 18, 1998, the Pennsylvania Superior Court issued its decision in the matter of ***Young v. Western Pennsylvania Hospital***, 722 A.2d 153 (Pa. Super. 1998) (*reargument denied)*, (decided November 16, 1998). In ***Young***, the issue was the propriety of the discovery request, rather than the particularity of the responses. In pre-trial discovery, Plaintiffs had requested "all documents, records and information submitted for the purposes of reviewing [the defendant's] staff privileges." ***Id***. at 154. The Superior Court sustained the trial judge's refusal to grant that discovery and in so doing felt compelled to clarify the application of the term "original document" under the Peer Review Protection Act. Recognizing the gravity of peer review proceedings and the legislatively recognized need for confidentiality in such proceedings, the ***Young*** Court established necessary criteria for demanding "original documents" under the Act. The Court specifically did not approve the demand by plaintiff for *all* documents that would relate to the peer review committee's review of the Defendant Doctor's staff privileges, by stating:

> Open-ended, undefined discovery demands are not self-proving. Instead, demands for information, documents or materials covered by the Peer Review Protection Act must be clearly defined and narrowly tailored. The medical provider must be able to determine the identity of the documents demanded from the face of the discovery demand. The Peer Review Protection Act does not support or allow for fishing expeditions by parties seeking 'original' documents used by a peer review committee without first knowing what those documents are and so naming them in the discovery demand…In order to argue that the documents requested are 'original

> documents,' a party must establish this fact before the court. If a party is unsure, then an in camera review of documents might be considered.

Id. at 156-157.

Inasmuch as the discovery process in this case is still ongoing this Court believes that the law enunciated in ***Young*** must be applied in determining Hospital's objections under the Act. A peer review organization whose proceedings, records and documents are protected under the Peer Review Protection Act includes, "any hospital board, committee or individual reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto," as well as a physician' advisory committee. 63 P.S. §425.2. Under ***Cooper v. Delaware Valley,*** *supra* and ***Corrigan v. Methodist Hospital,*** *supra,* it is also clear that internal hospital procedures, such as quarterly staff meetings and credentialing (kicked out of spellchecker) of staff physicians, are peer review proceedings. *See also,* ***Fetterman v. Habe***, 47 D&C3d 435 (Jefferson Co. 1987).

This Court believes Plaintiffs' request for the entire personnel file of Dr. Dixon in connection with his employment at the Hospital, including work history records, job performance and evaluation records, should be determined by the same standards applied in ***Young.*** Under those standards, Plaintiffs' discovery request is improper.

Requesting the entire personnel file of Dr. Dixon is tantamount to a "fishing expedition." Requesting *all* records pertaining to his employment with the Hospital, including "job performance and evaluation records" broadly includes a request for information related to the issuance of Dr. Dixon's staff privileges and/or any action which may or may not have been taken to continue, limit or revoke them. The

request therefore seeks material that may be protected by the Peer Review Protection Act at least inasmuch as the request seeks material within the same class being sought and protected in ***Young***, *supra*. Plaintiffs' request therefore seeks documents which, may for the most part, only be available to Plaintiffs if they are original documents produced for some purpose other than peer review ("original documentation" as set forth in ***Young***).

The Superior Court in ***Young,*** which decision this Court is compelled to follow, makes it very clear that such requests may not be open-ended, with undefined discovery being requested. Rather, the notice for production of documents must limit the nature of the documents demanded and indicate that the request is limited to such original documents and is not an open-ended fishing expedition.

Accordingly, the following Order will be entered.

O R D E R

AND NOW, this 24th day of May 1999, the Motion for *In Camera* Review of Response of the Defendant Williamsport Hospital and Medical Center to Plaintiffs' Request for Production of Documents filed by the Plaintiffs on January 26, 1998 is DENIED. The Defendant is not required to make any additional response to Plaintiffs' request for production of documents served on or about November 5, 1997, identified in the foregoing Opinion. Plaintiffs may, within the time set for discovery in this case by the Court Scheduling Order, make further discovery requests as to the same material sought in the production request of November 5, 1997; however, any such requests shall comply with the limitations established under ***Young v. Western Pennsylvania Hospital***, 722 A.2d 153 (Pa. Super. 1998). Any response made by the Defendant to such a discovery request shall adhere to the standards set forth in the foregoing Opinion as would relate to compliance with Pa. Rule of Civil Procedure 4009.12.

BY THE COURT,

William S. Kieser, Judge

cc: Eileen A. Grimes, CST
Clifford A. Reiders, Esquire
David R. Bahl, Esquire
C. Edward S. Mitchell, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire
h:\Acivil\Wein v. Williamsport\In-Camera;Production of Documents